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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 172

ERIC G. KAUFMAN and AENNI C. KAUFMAN, *Petitioners,*

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A., etc.,

J. HOWARD MCGRATH, Attorney General of the United States, as successor to the Alien Property Custodian, GEORGIA NEESE CLARK, Treasurer of the United States, and REMINGTON RAND, INC., *Respondents.*

REPLY BRIEF FOR THE PETITIONERS.

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REPLY BRIEF FOR THE PETITIONERS.

I.

The Right to a Partial Return of Vested Assets.

Notwithstanding petitioners' repeated challenge both to the plaintiff corporation and to the Government to treat on the merits the issue of whether a right to partial return exists, we submit that in the main they have failed to do so.

Neither respondent has seriously challenged petitioners' analysis of the Act and of the *Uebersee* case (Petitioner's

Brief, pp. 17-20). Neither respondent has questioned petitioners' exposition of the judicial, legislative and executive developments subsequent to the *Uebersee* case (pp. 26-36) and of the policy and constitutional considerations involved (pp. 36-39). Neither respondent offers any constructive alternatives.

The Government's brief in its entirety relies upon the premise that petitioners' intervention is to compel the plaintiff corporation to assert a claim personal to the non-enemy stockholders. The Government presumes without any basis in fact or in law that if enemy shareholders are ineligible to participate in a recovery by the plaintiff corporation and if such recovery would thus redound to the benefit of the non-enemy shareholders, the claim becomes a claim of the shareholders, ergo, a claim personal to them, but one which they do not have the standing to raise in this case because shareholders as such have no interest in the property of their corporation.

This we submit is the sum and substance of the argument of both respondents. They have thereby avoided frank consideration as to whether, notwithstanding a substantial enemy interest in the plaintiff corporation, there nonetheless exists a right of partial return to the corporation itself of its vested assets. To say that petitioners are seeking to enforce their individual right does not make it so. As was pointed out in petitioners' brief (pp. 41-43), a court of equity, in administering a corporate recovery [a Section 9(a) action is by definition an action in equity], has the power to control its disposition so that the interests of wrongdoers, whether they be stockholders or directors or third parties, are either eliminated or subordinated. If the corporation, as in this case, should be unable to recover all of its property because certain of its shareholders and officers should be found to be enemy or enemy tainted, these established principles of equity as well as the Act itself require that the corporate recovery whether by judgment or settlement shall not inure to their benefit.

The plaintiff corporation in effect concedes the validity of these principles but argues weakly that they constitute an exception to the general rules governing corporate recoveries. (Pltf's. Br., p. 8) The Government ignores them completely since it has chosen to base its entire brief on the premise that if all of the stockholders do not participate in a corporate recovery, the claim is to be considered *ab initio* as an individual claim rather than as a corporate claim. But as appears in cases which we have cited in our main brief (p. 42), a corporate claim in which all are not eligible to benefit remains nonetheless a corporate claim.

As a matter of fact, if the Government is correct that any claim for *partial* return is personal to the stockholders, by what right does the Government purport to effect any settlement whatsoever with the corporate entity for a *partial* return *to* the corporation, especially upon the terms alleged by your petitioners, nowhere denied by either of the respondents, terms which the Government in the *Uebersee* case has stated to be contrary to the provisions of the Act. Recognizing this inconsistency, the Government asserts that the stockholders will be bound only *pro tanto*, and that they continue to retain individual claims, *pro tanto*. In making this argument as a desperate expediency, the Government would willingly sacrifice its own established principles relating to settlements of corporate actions so that henceforth, no settlement with a corporation can effectively dispose of a claim in controversy unless all of the stockholders consent.

There remains unchallenged the simple fact that the property *of* the corporation was vested *from* the corporation and, since, as the Government argues, a stockholder has no interest in the corporate property, it is to the corporation that return of its property must be made whether it be all or part.

As we have stated above, we do not find in the Government's brief any serious effort to argue against return to the corporation upon its own claim, except perhaps indirectly in two sentences on page 24 of its brief: "We sub-

mit there is equal ground for vesting and retaining the property of corporations which are enemy tainted for whatever reason, whether it be that they are incorporated in Germany, that they do business there, or that they are controlled by the enemy in fact or by virtue of 50% enemy stock ownership." As a footnote thereto, the Government states: "It is a valid inference that 50% of stockholders in a corporation exercise control." The Government cites no authority for this argument nor does it even attempt to demonstrate its relationship to the facts of this case. Moreover, one might infer from the quoted text that the Government is willing to abandon any claim on its part for retention of any part of the property of the plaintiff corporation if less than 50 percent of its stock is owned by enemies, or even if more than 50 percent of its stock is owned by enemies where the inference of enemy control is rebutted. As for its policy argument, it asserts only that investors must accept the consequences of losses by the corporation (p. 25). Yet the Government, in this context, does not deny that it has never vested the assets of an American corporation whose stock is majority owned *and* controlled by enemies. Even in a case where over 90% of the stock was enemy owned and controlled, the remaining 10% has been left untouched. (Petitioner's Brief, p. 25, n. 13.)

The Government tangentially relies at this point on the prize law cases and Section 32 of the Act, but *only* to support the proposition that stockholders do not have an interest in corporate property vested as that of an enemy—again no mention or any consideration of the main proposition whether the corporation itself has an interest in vested corporate property. With respect to the prize law cases and the foreign cases which the Government cites, we think it enough to observe that these cases had already been decided and rejected when it was clearly the law under the Act that a neutral corporation was entitled to a return of all of its vested assets even though it may have been wholly enemy owned. *Hamburg-American Line Terminal & Navigation Co.* v. *United States*, 277 U. S. 138, 140 (1928). The Government nowhere shows why such cases which were in-

applicable to the Act prior to 1941 suddenly became the basis for interpreting the Act after amendment to Section 5(b). Insofar as the reference to prize law may be an inarticulate attempt to meet the constitutional considerations involved in this case, we need point out only that the express constitutional provisions concerning prizes are nowhere here involved.

The Government then refers to Section 32 as "clarification of the proposition, relevant here, that nonenemy stockholders can have no rights in vested corporate assets." Again no mention of the corporate claim. The Government attempts to infer from Section 32 that this section lays bare the whole Congressional intent with respect to return of all vested property. On the contrary, as petitioners have pointed out (Br., pp. 35-36), Section 32 deals only with the circumstances in which the Custodian, in his discretion, may make a voluntary return of vested assets without requiring the claimant to resort to the judicial process under Section 9(a). It will be remembered that one of the grounds upon which the Custodian may refuse a return under Section 32 is that such a return is not "in the interest of the United States." Indeed, it was on that ground and upon *no* other that the Custodian refused to make administrative return of the vested property to this plaintiff corporation. Further any action or non-action on the part of the Custodian under Section 32 is entirely within his discretion and is not subject to judicial review. The impression which the Government apparently is seeking to create, that such a discretionary process on the part of the Custodian is coterminous with or a substitution for the right of judicial return afforded by Section 9(a), is clearly erroneous. *McGrath* v. *Zander*, 177 F. 649 (C. A. D. C. 1949).

The Government then refers specifically to Section 32(a)(2)(E) as supporting its position. That subsection provides that the Custodian may in his discretion return *all* of the vested property of a foreign corporation in a case where less than 50 percent of the stock is owned by enemies and where the corporation is not controlled by enemies. Be it

noted that such a return makes whole all of the stockholders in such a corporation so that the benefits derived therefrom by the enemy shareholders do not diminish the interests of the non-enemy shareholders. The Government seeks to draw the inference that the "50 percent rule of Section 32(a)(2)(E)" may perhaps be regarded as a legislative view of one of the questions stated in *Uebersee* (even though it was enacted prior to the decision) as to the extent of holdings necessary to constitute enemy taint. The Government in substance is asking this Court to assume that Congress intended that in any case in which the Custodian in his absolute discretion decides not to make whole the enemy and non-enemy alike, a neutral corporation cannot have returned to it any of its assets however substantial the non-enemy ownership. We submit that the Act does not require and the Congress never intended that a neutral corporation with substantial, perhaps majority, non-enemy ownership depend upon the largesse of the Custodian, without any right of judicial review.

The brief of respondent plaintiff corporation makes no pretense of any serious discussion on the merits as to its own right to a partial return, except to say that it cannot, and even if it could, it will not make such claim. Only if petitioners are permitted to intervene will this claim ever be asserted.

II.

The Illegality of the Settlement.

It is in connection with the settlement of the principal action that the briefs of the respondents show the tragic weakness of the position which they seek to maintain. Neither brief challenges the factual statements made by the petitioners in their pleadings and in their brief concerning the imminence, the terms and nature of the proposed settlement. Your petitioners have stated that the proposed settlement is for an amount far less than the proportionate interests of the corporation's non-enemy stockholders in the vested assets. This has not been challenged. Your

petitioners have alleged that the plaintiff corporation and the Government intend that the proceeds of the settlement shall inure alike to enemy and non-enemy interests in the corporation. This has nowhere been denied. Your petitioners have taken the view that such a settlement is contrary to the Trading With The Enemy Act and therefore illegal, and that the management of the corporation is seeking such a settlement because of its personal and financial self-interest. The Government weakly attempts to meet the petitioners' argument on the illegality of the settlement. The corporation ignores it but takes refuge in the fact that petitioners have not cried "fraud". The terms and nature of the settlement speak for themselves.

As we pointed out in our main brief, the Government itself has taken the position in the *Uebersee* case, now pending before this Court, that a partial return to a foreign corporation, inuring alike to enemy and non-enemy stockholders, would be contrary to the Act and illegal. In its brief in this case the Government attempts to uphold the legality of the proposed settlement upon two grounds: (1) that a settlement in which a partial return is made to a corporation inuring to enemy and non-enemy alike is not such a partial return, and (2) that, if such a settlement is a partial return, then it is wrong in the *Uebersee* case and right here because of the provisions of Section 32 (a) (2) (E). As we have already pointed out, that section permits the Custodian in his discretion to return *all* the vested assets to a foreign corporation having enemy and non-enemy interests. The Government does not explain how it can use this provision as a justification for a "partial return" where whatever the enemy interests receive is at the expense of the American and friendly alien interests, a result as inconsistent with the purposes of the Act as can be imagined.

Conclusion.

The Government's brief assumes, and the plaintiff corporation's brief concedes (p. 7) that if it be determined that the right to a partial return of corporate property is in the corporation, and is not a right which is personal to the stockholders, petitioners must be permitted to intervene to assert that right on behalf of the corporation. The respondents' characterization of the claim here made by petitioners as one personal to them but in the name of the corporation, is but an elaborate strawman. The claim asserted by petitioners is on behalf of the corporation and is a corporate claim. That enemies under the Act may be ineligible to participate in a corporate recovery, in furtherance of the purposes of the Act, does not affect the character of the claim nor the identity of the claimant. In any event, petitioners have the standing to intervene if for no other reason than to prevent an improvident settlement which the respondents are about to make in diminution of the rights of the non-enemy shareholders and in a manner which is illegal and contrary to the purposes of the Act.

Respectfully submitted,

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